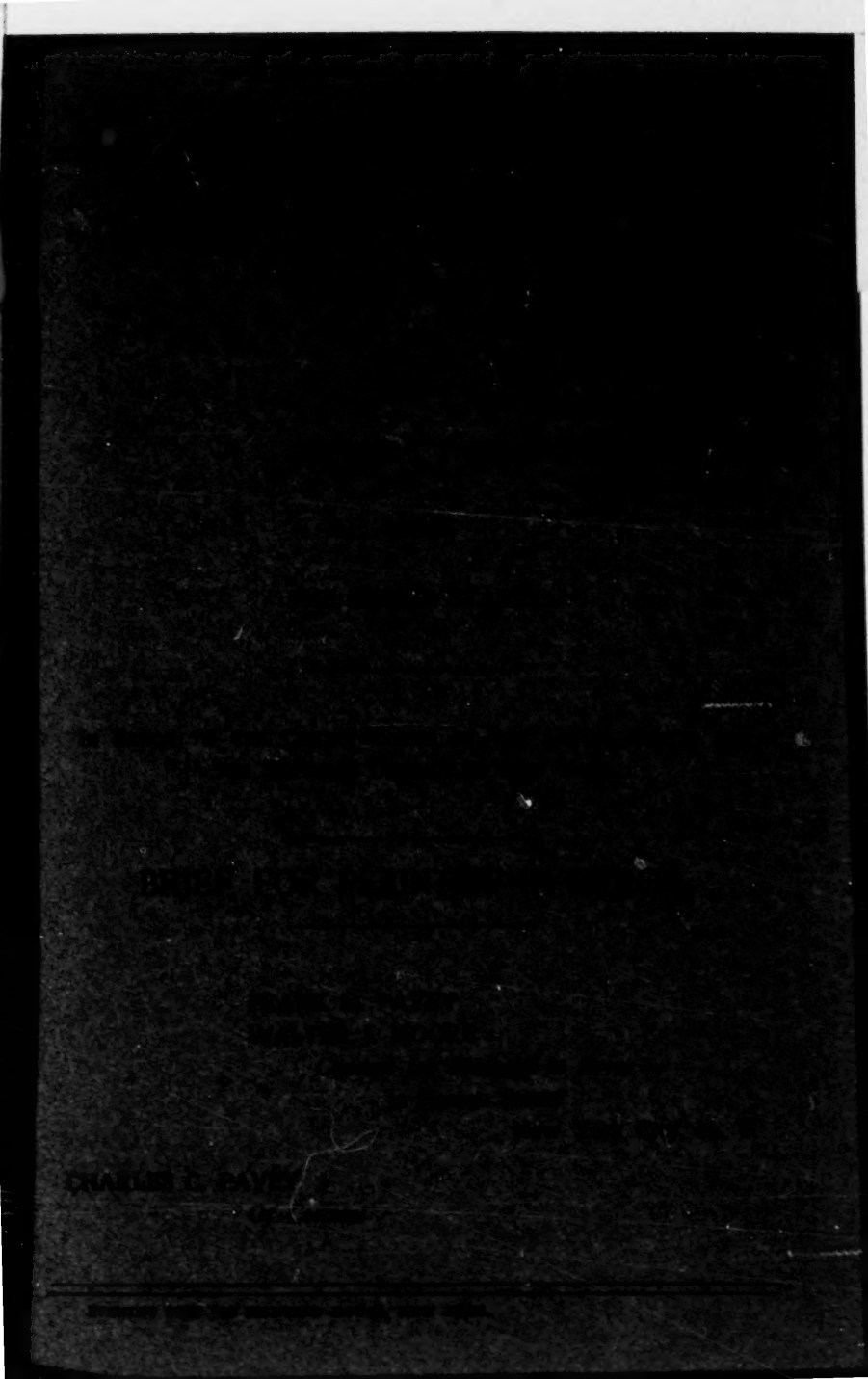

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Supreme Court of the United States

OCTOBER TERM, 1903

No. 43

GEORGE C. THOMAS

Plaintiff in Error

against

THE UNITED STATES

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF IN ERROR

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5035

INDEX.

	PAGE
STATEMENT OF THE CASE	1
Legal Questions Involved	4
The War Revenue Law	5
SPECIFICATIONS OF ERRORS	6
BRIEF OF THE ARGUMENT	11
THE ARGUMENT	13
Source of Federal Power of Taxation	13
Direct Taxes: Why so Restricted in the Constitution	15
The Power to Tax involves the Power to Destroy	17
Two Classes of Direct Taxes	21
Shares and Certificates of Stock are Property	21
The Right of Sale is an Attribute of Property	22
A Tax on Sales is a Tax on the Articles Sold	24
Two Rules of Construction	24
Other Illustrations of the Rules of Construction	30
Conclusion of Argument	33

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GEORGE C. THOMAS,
Plaintiff in Error,
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THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On December 10, 1901, the Grand Jury within and for the Southern District of New York in the Second Circuit indicted the plaintiff in error for having sold on the 15th day of May, 1901, in the City of New York one hundred shares of Atchison preferred stock to one T. D. Scoble and for having unlawfully and willfully made and delivered to said Scoble a memorandum of said sale without having affixed to said memorandum the proper revenue stamps as required by an act of Congress popularly known as the "War Revenue Law" approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes" (30 U. S. Statutes, 448, 451, 458), with in-

tent to evade the provisions of Section 25, Schedule A, of said act. (Record, p. 3)

The plaintiff in error demurred to this indictment upon the ground that the facts alleged in the indictment did not constitute an infringement of or a crime against the laws of the United States for the reason that those portions of the act upon which the indictment was based were unconstitutional and void because they were in violation of the Constitution of the United States and more particularly in violation of article 1, section 2, subdivision 3, thereof which provides that "representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers", and of article 1, section 9, subdivision 4, thereof which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken". The demurrer was overruled on January 31, 1902, and an exception granted. (Record, pp. 4, 5, 17, 18)

On March 12, 1902, the plaintiff in error was tried upon a plea of not guilty. During the trial he objected to the following question put to said T. D. Scoble, a witness for the government, viz.: "At the time that memorandum of sale was delivered to you, were there any stamps upon it of any kind?" as immaterial and irrelevant upon the ground that the failure or refusal of the defendant to affix stamps to a bill or memorandum of the sale of shares or certificates of stock did not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the same reasons stated in the demurrer. This objection was overruled and an exception taken. (Record, pp. 19, 20)

When the Government rested, the plaintiff in error offered no testimony and moved the court to direct a verdict for him upon the ground that the facts were not controverted and that the facts as proven on the trial of the case did not constitute a

crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the same reasons stated in the demurrer to the indictment. This motion was denied and an exception taken. (Record, p. 20)

Thereupon the plaintiff in error asked the court to instruct the jury that those portions of the law in question which required the payment of stamp taxes upon the sales of shares or certificates of stock were unconstitutional and void for the same reasons stated in the demurrer to the indictment. The court declined to so charge the jury and an exception was taken. (Record, pp. 20, 21)

The court instructed the jury that it must accept the statute as valid law. The plaintiff in error took an exception to this portion of the charge to the jury upon the ground that it was an improper and incorrect statement of the law applicable to the case. (Record, p. 21)

The jury rendered a verdict of guilty. (Record, p. 21)

Thereupon the plaintiff in error moved the court to set aside the verdict of the jury and grant a new trial upon the following grounds:

> "1. The court erred in overruling the objection of the defendant and allowing testimony to be taken and evidence to be introduced under the indictment in this case in reference to the failure or refusal of the defendant to affix stamps to the bill or memorandum of sale set forth in said indictment.
>
> "2. The court erred in overruling the motion of the defendant for a direction to the jury to bring in a verdict of not guilty.
>
> "3. The court erred in denying the request of the defendant to charge the jury."

The motion for a new trial was denied and the plaintiff in error took an exception. (Record, p. 21)

The sentence of the court was that the plaintiff in error be fined $500 and committed to jail until

the fine was paid or he was otherwise discharged by law. (Record, p. 22)

Thereupon the plaintiff in error made a motion in arrest of judgment for the same reasons stated in the demurrer to the indictment which was overruled and an exception taken. (Record, p. 22)

From this trial and judgment the plaintiff in error perfected his writ of error in this Court and now prays a reversal of the judgment of said Circuit Court.

LEGAL QUESTIONS INVOLVED.

Two legal questions are presented in the record:

1. The tax levied by "Schedule A" of the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes", on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation, is a direct tax.

2. The direct tax thus imposed not being apportioned among the several States according to their respective numbers, that portion of the act imposing said tax upon which said indictment and conviction is based is unconstitutional and void because it is in violation of the Constitution of the United States, and more particularly in violation of subdivision 3, section 2, article 1, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers", and of subdivision 4, section 9, article 1, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken".

THE WAR REVENUE LAW.

The portions of the War Revenue Law material to these questions are as follows:

"ADHESIVE STAMPS."

"SECTION 6. That on and after the first day "of July, eighteen hundred and ninety eight- "there shall be levied, collected and paid, for "and in respect of the several bonds, deben- "tures or certificates of stock and of indebt- "edness, and other documents, instruments, "matters, and things mentioned and described "in Schedule A of this act, or for or in re- "spect of the vellum, parchment or paper "upon which such instruments, matters, or "things, or any of them, shall be written or "printed by any person or persons, or party "who shall make, sign, or issue the same, or "for whose use or benefit the same shall be "made, signed, or issued, the several taxes "or sums of money set down in figures "against the same, respectively, or otherwise "specified or set forth in the said schedule."

* * * * * *

"SCHEDULE A."

"Stamp Taxes."

"Bonds, debentures, or certificates of in- "debtedness issued after the first day of July, "Anno Domini eighteen hundred and ninety- "eight, by any association, company, or cor- "poration, on each hundred dollars of face "value or fraction thereof, five cents, and on "each original issue, whether on organization "or reorganization, of certificates of stock by "any such association, company, or corpora- "tion, on each hundred dollars of face value "or fraction thereof, five cents, *and on all "sales, or agreements to sell, or memoranda "of sales or deliveries or transfers of shares "or certificates of stock in any association, "company, or corporation, whether made upon "or shown by the books of the association, "company, or corporation, or by any assign-*

" *ment in blank, or by any delivery, or by any*
" *paper or agreement or memorandum or other*
" *evidence of transfer or sale whether entitling*
" *the holder in any manner to the benefit of*
" *such stock, or to secure the future payment*
" *of money or for the future transfer of any*
" *stock, on each hundred dollars of face value*
" *or fraction thereof, two cents: Provided,*
" that in case of sale where the evidence of
" transfer is shown only by the books of the
" company the stamp shall be placed upon
" such books; and where the change of owner-
" ship is by transfer certificate the stamp
" shall be placed upon the certificate;
" *and in cases of an agreement to*
" *sell or where the transfer is by de-*
" *livery of the certificate assigned in blank*
" *there shall be made and delivered by the*
" *seller to the buyer a bill or memorandum of*
" *such sale, to which the stamp shall be af-*
" *fixed;* and every bill or memorandum of sale
" or agreement to sell before mentioned shall
" show the date thereof, the name of the
" seller, the amount of the sale, and the mat-
" ter or thing to which it refers. And any
" person or persons liable to pay the tax as
" herein provided, or any one who acts in the
" matter as agent or broker for such person
" or persons, who shall make any such sale, or
" who shall in pursuance of any such sale de
" liver any such stock, or evidence of the sale
" of any such stock or bill or memorandum
" thereof, as herein required, without having
" the proper stamps affixed thereto, with in-
" tent to evade the foregoing provisions shall
" be deemed guilty of a misdemeanor, and
" upon conviction thereof shall pay a fine of
" not less than five hundred nor more than
" one thousand dollars, or be imprisoned
" not more than six months, or both, at the
" discretion of the Court."

SPECIFICATIONS OF ERRORS.

I.—The Circuit Court erred in overruling the demurrer of the defendant to the indictment filed in said cause on the 10th day of December, 1901.

II.—The Circuit Court erred in allowing the admission of evidence of the absence of any stamps on the memorandum of sale in this cause at the time of its delivery against the objection of the defendant as follows:

Q. At the time that memorandum of sale was delivered to you were there any stamps upon it of any kind?

Defendant's counsel objects to the question as immaterial and irrelevant.

The defendants objects to the question as immaterial and irrelevant upon the ground that the failure or refusal of the defendant to affix stamps to a bill or memorandum of the sale of shares or certificates of stock does not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and, more particularly, in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers"; and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportions to the census of enumeration hereinbefore directed to be taken".

Objection overruled. Exception taken.

A. There were no stamps affixed to it.

III.—The Circuit Court erred in denying the motion of the defendant that the Court direct the

jury to return a verdict of not guilty forthwith without retiring to consider their verdict. The said motion and the ruling were as follows:

Mr. Pavey: We offer no evidence, and the defend ant moves the Court to direct the jury to return a verdict of not guilty forthwith, without retiring to consider their verdict, upon the ground that the facts are not controverted and the facts as proven on the trial of the case do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the Act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the War Revenue Law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers"; and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken.

IV.—The Circuit Court erred in declining to charge the jury as requested by the defendant. The said request and the ruling were as follows:

Mr. Pavey: I ask the Court to instruct the jury:

The defendant requests the Court to instruct the jury that those portions of the act of Congress entitled "An Act to provide ways and means to meet war expenditures and for other purposes," approved

June 13, 1898, and known as the War-Revenue Law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3 thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4 thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The Court: I decline to so charge.

Exception taken.

V.—The Circuit Court erred in that portion of its charge to the jury in which it directed the jury that it must accept the statute in question as valid law. The portion of said charge in which the Court erred and the exception taken are as follows:

The Court, THOMAS, *J.*:

"* * * The sole defense is that the statute itself is unconstitutional. That question has heretofore come before me upon a demurrer to this indictment, and I have fully examined the question and overruled the demurrer, and held the statute to be constitutional, so that you are to accept the statute as a valid law, and as the facts are uncontradicted it is for you to render a verdict in accordance with those facts. * * *"

Mr. Pavey: I except to that portion of the charge in which you direct the jury that it must accept the statute in question as valid law, upon the ground that it is an improper and incorrect statement of the law applicable to the case at bar.

VI.—The Circuit Court erred in denying the motion of the defendant for a new trial. The said motion and the ruling were as follows:

Mr. Pavey: I would like to make a motion for a new trial.

The defendant moves the Court to set aside the verdict of the jury and grant a new trial to the defendant upon the following grounds:

1. The Court erred in overruling the objection of the defendant and allowing testimony to be taken and evidence to be introduced under the indictment in this case in reference to the failure or refusal of the defendant to affix stamps to the bill or memorandum of sale set forth in said indictment.

2. The Court erred in overruling the motion of the defendant for a direction to the jury to bring in a verdict of not guilty.

3. The Court erred in denying the request of the defendant to charge the jury.

The Court: I deny the motion for a new trial.

Exception taken.

VII.—The Circuit Court erred in denying the motion of the defendant in arrest of judgment. The said motion and the ruling were as follows:

Mr. Pavey: Now, I make the motion in arrest of judgment.

The defendant moves the Court to arrest the judgment in the case upon the ground that the facts alleged in the indictment and proven on the trial do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States, for the reason that the provisions of the act of Congress, entitled "An

act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, and known as the War Revenue Law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void, because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers"; and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken. (Record, pp. 25, 26, 27.)

BRIEF OF THE ARGUMENT.

A TAX UPON PROPERTY IS A DIRECT TAX WITHIN THE MEANING OF THE CONSTITUTION AND MUST BE APPORTIONED AMONG THE STATES IN PROPORTION TO THE CENSUS.

Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 429, 583; 158 U. S., 601, 637.

Constitution of the United States, Article 1, Section 2, Subdivision 3; Article 1, Section 9, Subdivision 2.

SHARES AND CERTIFICATES OF STOCK ARE PROPERTY.

Jellenik *vs.* Huron Copper Mining Co., 82 Fed. Rep., 778.

Allen *vs.* Pegram, 16 Iowa, 163.

Mattingly *vs.* Roach, 84 Cal., 207.
Sargent *vs.* Franklin Ins. Co., 8 Pick., 90.
Weaver *vs.* Barden, 49 N. Y., 286.
23 Am. & Eng. Enc. Law, 590.
Cook on Corporations (4 Ed.), Vol. 1, p. 41.

THE RIGHT OF SALE AND TRANSFER IS AN INHERENT ATTRIBUTE OF PROPERTY.

1 Blackstone's Commentaries, 138.
2 Kent's Commentaries, 317, 320, 326.
Bouvier's Law Dictionary — Property.
Rutherford's Institutes, p. 20.
Puffendorf's Laws of Nature, p. 220.
Wynehamer *vs.* People, 13 N. Y., 396, 397.
Sherman *vs.* Elder, 24 N. Y., 381.
Toledo Bank *vs.* Bond, 1 Ohio St., 662.
Exchange Bank of Columbus *vs.* Hines, 3 Ohio St., 8.
Tod *vs.* Wick, 36 Ohio St., 385.
Kuhn *vs.* Common Council, 70 Mich., 537.
Arapahoe County *vs.* Printing Co., 15 Colo. App., 196.
Commonwealth *vs.* Maury, 82 Va., 883.
State *vs.* Kreutzberg, 114 Wis., 534.
In re Marshall, 102 Fed. Rep., 324.

A TAX UPON THE SALE OF ARTICLES IS IN SUBSTANCE A TAX UPON THE ARTICLES THEMSELVES AND IS INVALID IF A TAX LAID IN THE SAME MANNER UPON THE ARTICLES THEMSELVES IS INVALID.

Brown *vs.* Maryland, 12 Wheaton, 419, 444.
Welton *vs.* Missouri, 91 U. S., 275, 279.

Cook *vs.* Pennsylvania, 97 U. S., 566, 573.
Almy *vs.* California, 24 How., 174.
Nicol *vs.* Ames, 173 U. S., 509, 521.
Fairbank *vs.* United States, 181 U. S., 293.

A TAX UPON THE SALES OF SHARES OR CERTIFICATES OF STOCK IS IN SUBSTANCE A TAX UPON THE SHARES OR CERTIFICATES THEMSELVES. IT IS THEREFORE A TAX UPON PROPERTY AND IS A DIRECT TAX WITHIN THE MEANING OF THE CONSTITUTION. THE WAR REVENUE TAX UPON THE SALES OF SHARES OR CERTIFICATES OF STOCK IS NOT LAID IN PROPORTION TO THE CENSUS OR ENUMERATION OR APPORTIONED AMONG THE STATES ACCORDING TO THEIR NUMBERS AND IS THEREFORE UNCONSTITUTIONAL AND VOID.

ARGUMENT.

SOURCE OF FEDERAL POWER OF TAXATION.

All power of Federal taxation is derived from the Constitution of the United States. The Federal Government has no inherent power of taxation in any form. The authority of Congress to impose any tax must be found and exercised within the terms and subject to the limitations of the Constitution. In reference to Federal taxation the provisions of that instrument consist of a grant, two limitations upon that grant and a prohibition. These provisions are as follows:

"The Congress shall have power:

"1. To lay and collect taxes, duties, im-
"posts and excises; to pay the debts, and

" provide for the common defense and general
" welfare of the United States; but all duties,
" imposts and excises shall be uniform
" throughout the United States."

Article 1, Section 8, Subdivision 1.

" Representatives and direct taxes shall be
" apportioned among the several states which
" may be included within this Union, accord-
" ing to their respective numbers; * * *."

Article 1, Section 2, Subdivision 3.

" No capitation or other direct tax shall be
" laid, unless in proportion to the census or
" enumeration hereinbefore directed to be
" taken."

Article 1, Section 9, Subdivision 4.

" No tax or duty shall be laid on articles
" exported from any state * * *."

Article 1, Section 9, Subdivision 5.

The power of Congress to tax is tersely stated and defined by Mr. Chief Justice Chase in the License Tax Cases in the following language:

" It is true that the power of Congress to
" tax is a very extensive power. It is given
" in the Constitution, with only one exception
" and only two qualifications. Congress can-
" not tax exports, and it must impose direct
" taxes by the rule of apportionment, and
" indirect taxes by the rule of uniformity.
" Thus limited, and thus only, it reaches
" every subject, and may be exercised at
" discretion."

License Tax Cases, 5 Wall., 462, 471.

The same rule of construction applies to the grant, the limitation upon the grant and the prohibition of the power of taxation.

" We are not here confronted with a ques-
" tion of the extent of the powers of Congress,
" but one of the limitations imposed by the
" Constitution on its action, and it seems to
" us clear that the same rule and spirit of

"construction must also be recognized. If "powers granted are to be taken as broadly "granted and as carrying with them author- "ity to pass those acts which may be reason- "ably necessary to carry them into full "execution; in other words, if the Constitu- "tion in its grant of powers is to be so con- "strued that Congress shall be able to carry "into full effect the powers granted, *it is* "*equally imperative that where prohibition* "*or limitation is placed upon the power of* "*Congress that prohibition or limitation* "*should be enforced in its spirit and to its* "*entirety.*"

Fairbank *vs.* United States, 181 U. S., 288–9.

DIRECT TAXES—WHY SO RESTRICTED IN THE CONSTITUTION.

The purpose and object of these provisions in the Constitution of the United States are discussed at length by the members of this Court in many opinions, but particularly in the opinions in the Income Tax Case (Pollock *v.* Farmers' Loan & Trust Company, 157 U. S., 429; 158 U. S., 601). The importance of this case led to an exhaustive examination by counsel and by members of this Court of the meaning of the term "direct" and "indirect" taxes as understood by English-speaking people before and at the time of the founding of the Federal Government. This examination covered the fields of history, literature, lexicography, constitutional debates, congressional acts and judicial decisions. While all these sources of interpretation as to the meaning of the terms are valuable the final determination of their meaning in particular cases must be controlled by the purpose and intention of the Constitutional Convention in putting the terms into the Federal Constitution. The reasons which led the framers of the Constitution to insert the provision that direct taxes shall be apportioned and

that no capitation or other direct tax shall be laid unless in proportion to the census or enumeration are well stated in two of the opinions of the Income Tax Case.

Mr. Chief Justice Fuller said:

> "The states were about, for all national "purposes embraced in the Constitution, to be- "come one, united under the same sovereign "authority, and governed by the same laws. "But as they still retained their jurisdiction "over all persons and things within their "territorial limits, except where surrendered "to the general government or restrained by "the Constitution, they were careful to see to "it that taxation and representation should go "together, so that the sovereignty reserved "should not be impaired, and *that when Con- "gress, and especially the House of Repre- "sentatives, where it was specifically pro- "vided that all revenue bills must originate, "voted a tax upon property, it should be "with the consciousness, and under the re- "sponsibility, that in so doing the tax so "voted would proportionately fall upon the "immediate constituents of those who im- "posed it.*" (157 U. S., 556)

Mr. Justice Field said:

> "On the one hand, anything like oppres- "sion or undue advantage of any one State "over the others would be prevented by the "apportionment of the direct taxes among "the States according to their representa- "tion, and, on the other hand, anything like "oppression or hardship in the levying of "duties, imposts, and excises would be "avoided by the provision that they should "be uniform throughout the United States. "*This compromise was essential to the con- "tinued union and harmony of the States. "It protected every State from being con- "trolled in its taxation by the superior num- "bers of one or more other States.*" (157 U. S., 587–8)

The plaintiff in error maintains that the spirit and purpose of the restrictions in the constitution

are violated by the War Revenue Law. He maintains that under that law the property of certain States is controlled in its taxation and may be destroyed by the superior numbers of one or more other States.

THE POWER TO TAX INVOLVES THE POWER TO DESTROY.

The several States of the Union have the power to create associations, companies and coporations and to authorize the issue of shares or certificates of stock in such associations, companies and corporations. If Congress has the power under any guise to levy a tax in the nature of an excise—one which need not be apportioned among the States according to population—upon the sale or transfer of any share or certificate of stock, there is no limit to which a majority of representatives in Congress from States hostile to certain industrial associations, companies or corporations may tax the sale and transfer of their shares or certificates of stock—even until the limit of destruction be reached. Thus a majority in Congress will have the power to defeat the very safeguards provided against such legislation when it was stipulated that direct taxes should be apportioned among the several States according to numbers and that no capitation or other direct tax should be laid unless in proportion to the census.

If this Court concede that Congress has the power to levy any tax upon any sale of shares or certificates of stock without apportioning the tax according to population, then it must concede that Congress has the power to tax at pleasure to destruction any such personal property within the United States by placing so great a tax upon a single transfer or sale that the value of the property will be swallowed up in the tax. For if Congress has the power to levy without apportionment upon every sale or transfer of shares or certificates of stock a tax of two cents

upon each one hundred dollars of actual or face value, it has the power to levy upon every sale or transfer a tax of one hundred dollars upon each one hundred dollars of actual or face value.

Then the equilibrium and equality in matters of taxation stipulated for among the several States in the Federal Constitution will be defeated; then the principle stated by Mr. Justice Field in Pollock *vs.* Farmers' Loan & Trust Company that those provisions of the Constitution "protected every State from being controlled in its taxation by the superior numbers of one or more other States" will be nullified; and then it will be found that Congress can accomplish indirectly by legislation the same result which it cannot accomplish directly because of constitutional restrictions.

This line of argument may be denounced as foolishness because Congress would not do such an absurd thing; public sentiment would not tolerate it; and to carry taxation "to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government". This same line of argument, however, has on more than one occasion been advanced and treated by this Court with serious consideration. In McCulloch *vs.* Maryland (4 Wheaton, 316, 431), Mr. Chief Justice Marshall said:

> "That the power to tax involves the power
> "to destroy; that the power to destroy may
> "defeat and render useless the power to
> "create; * * * are propositions not to be
> "denied. But all inconsistencies are to be
> "reconciled by the magic of the word CONFI-
> "DENCE. * * * But is this a case of con-
> "fidence?"

And upon another occasion (Brown *vs.* State of Maryland, 12 Wheaton, 419, 439, 447), Mr. Chief Justice Marshall said:

> "It is obvious that the same power which
> "imposes a light duty can impose a very
> "heavy one, one which amounts to a pro-

" hibition. Questions of power do not depend
" on the degree to which it may be exercised
" at the will of those in whose hands it is
" placed. * * * We are told that such
" wild and irrational abuse of power is not to
" be apprehended, and is not to be taken into
" view when discussing its existence. All
" power may be abused. * * * It will
" not meet this argument to say that this
" state of things will never be produced; that
" the good sense of the States is a sufficient
" security against it. The Constitution has
" not confided this subject to that good sense.
" It is placed elsewhere. The question is,
" where does the power reside; not how far
" will it be probably abused."

To the same effect Mr. Justice Field, in Welton *vs.* Missouri (91 U. S., 275, 281), said:

" The power of the State to exact a license
" tax of any amount being admitted, no au-
" thority would remain in the United States
" or in this Court to control its action, how-
" ever unreasonable or oppressive."

So the power in Congress to levy any tax however small as an excise tax without apportionment upon the sale of shares or certificates of stock being admitted, "no authority would remain in the United States or in this Court to control its action, however unreasonable or oppressive".

A recent decision of this Court emphasizes this proposition. This same War Revenue Law in another paragraph imposed a tax of ten cents upon bills of lading for exports from any port in the United States. In Fairbank *vs.* United States, this portion of the act was held to be invalid and Mr. Justice Brewer in delivering the opinion of the Court said:

" The requirement of the Constitution is
" that exports should be free from any gov-
" ernmental burden. The language is 'no
" tax or duty.' Whether such provision is or
" is not wise is a question of policy with

" which the courts have nothing to do. We
" know historically that it was one of the
" compromises which entered into and made
" possible the adoption of the Constitution.
" It is a restriction on the power of Congress;
" and as in accordance with the rules hereto-
" fore noticed the grants of powers should be
" so construed as to give full efficacy to those
" powers and enable Congress to use such
" means as it deems necessary to carry them
" into effect, so in like manner a restriction
" should be enforced in accordance with its
" letter and spirit, and no legislation can be
" tolerated which, although it may not con-
" flict with the letter, destroys the spirit and
" purpose of the restriction imposed. If, for
" instance, Congress may place a stamp duty
" of ten cents on bills of lading on goods to
" be exported it is because it has power to do
" so, and if it has power to impose this
" amount of stamp duty it has like power to
" impose any sum in the way of stamp duty
" which it sees fit. And it needs but a mo-
" ment's reflection to show that thereby it can
" as effectually place a burden upon exports
" as though it placed a tax directly upon the
" article exported. * * * The power to
" tax is the power to destroy."

Fairbank *vs.* United States, 181 U. S., 283, 290, 291.

The importance of the Income Tax Case lay in the fact that the income tax law was an attempt to levy a tax in a form which would not fall proportionately upon the constituents of the majority voting for the tax and the constituents of the minority voting against it. When the constitutionality of this law was presented for determination this Court arrived at the conclusion that not only taxes on real estate and the income thereof are direct taxes, but that taxes on personal property and the income thereof are likewise direct taxes within the meaning of the Federal Constitution. The Court defined in the following language two classes of direct taxes:

TWO CLASSES OF DIRECT TAXES.

"Our conclusions may, therefore, be summed
" up as follows:

" FIRST: We adhere to the opinion already
" announced, that, taxes on real estate being
" indisputably direct taxes, taxes on the rents
" or income of real estate are equally direct
" taxes.

" SECOND: We are of opinion that taxes on
" personal property, or on the income of per-
" sonal property, are likewise direct taxes."

Pollock *vs.* Farmers' Loan and Trust Co., 158 U. S., 601, 637.

These judicial definitions fix a new point of departure in arguments as to the constitutionality of Federal taxes. The contention of the plaintiff in error in the present case is twofold in character. He maintains that the original purpose and spirit of the Constitution is violated by the War Revenue Law. He maintains that the law is an attempt of a majority in Congress to levy a tax which will not fall proportionately upon the immediate constituents of those who imposed it. He maintains however that extensive argument *a priori* upon that question is rendered unnecessary by early and late decisions of this Court. The foundation of his argument is laid upon the decision of this Court that taxes upon personal property are direct taxes.

SHARES AND CERTIFICATES OF STOCK ARE PROPERTY.

It is now well settled that shares and certificates of stock are personal property.

Jellenik *vs.* Huron Copper Mining Co., 82 Fed. Rep., 778.

Allen *vs.* Pegram, 16 Iowa, 163.

Mattingly *vs.* Roach, 84 Cal., 207.

Sargent *vs.* Franklin Ins. Co., 8 Pick., 90.
Weaver *vs.* Barden, 49 N. Y., 286.
23 Am. & Eng. Enc. Law, 590.
Cook on Corporations (4 Ed.), Vol. 1, p. 41.

Some of the older authorities held that shares of stock were real or personal property according to the nature of the property of the corporation. This distinction is of no importance in this case. Under the decision of this Court in the Income Tax Case (Pollock *vs.* Farmers' Loan and Trust Company) taxes upon real and personal property are alike direct taxes.

THE RIGHT OF SALE AND TRANSFER IS AN INHERENT ATTRIBUTE OF PROPERTY.

"Property" includes the right to alienate and transfer a thing as well as the right to use and enjoy it. The earlier and later definitions of property recognize the right of sale as an inherent attribute of property.

1 Blackstone's Commentaries, 138.
2 Kent's Commentaries, 317, 320, 326.
Bouvier's Law Dictionary—Property.
Rutherford's Institutes, p. 20.
Puffendorf's Laws of Nature, p. 220.
Wynehamer *vs.* People, 13 N. Y., 396, 397.
Sherman *vs.* Elder, 24 N. Y., 381.
Toledo Bank *vs.* Bond, 1 Ohio St., 662.
Tod *vs.* Wick, 36 Ohio St., 385.
Kuhn *vs.* Common Council, 70 Mich., 537.
Arapahoe County *vs.* Printing Co., 15 Colo. App., 196.
Commonwealth *vs.* Maury, 82 Va., 883.
State *vs.* Kreutzberg, 114 Wis., 534.
In re Marshall, 102 Fed. Rep., 324.

This right and the authorities in support of it have been well defined and quoted in an opinion of the Court of Appeals of the State of New York.

> "Nor can I find any definition of property "which does not include the power of dis- "position and sale, as well as the right of "private use and enjoyment. Thus Black- "stone says (1 Com., 138): 'The third ab- "'solute right of every Englishman is that "'of property, which consists in the free use, "'enjoyment and *disposal* of all his acquisi- "'tions, without any control or diminution, "'save only by the laws of the land.' "Chancellor Kent says (2 Com., 320): 'The "'exclusive right of using and *transferring* "'property follows as a natural consequence "'from the perception and admission of the "'right itself.' And again (p. 326): 'The "'power of *alienation of property* is a neces- "'sary incident to the right, and was dic- "'tated by mutual convenience and mutual "'wants.' By another author, property is "defined as an 'exclusive right to things, "'containing not only a right to use "'those things, but a right to *dispose* "'of them, either by exchanging them "'for other things, or giving them away to "'any other person without consideration, "'or even throwing them away' (Bouvier's "Law Dictionary—Property). These defini- "tions are in accordance with the general "sense of mankind. Indeed, if any one can "define property eliminated of its attributes, "incapable of sale, and placed without the "protection of law, it were well that the at- "tempt should be made."
>
> Wynehamer *vs.* The People, 13 N. Y., 896.

The same rule has been stated by the courts of many other States.

> "We agree with the learned counsel for "the relator that property does not consist "merely of the title and possession. It in- "cludes the right to make any legal use of it,

"and the right to pledge or mortgage it, or "*to sell and transfer it.*"

Kuhn *vs.* Common Council, 70 Mich., 537.

"It will thus be seen, that in order to con "stitute property which is subject to owner- "ship as the terms are used in their broad "sense, there must exist, not only the right "of use and enjoyment, but the *exclusive* "*right to alienate or transfer.*"

Arapahoe County *vs.* Printing Co., 15 Colo. App., 196.

The question in the case at bar is whether a tax "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation" is a tax upon the shares or certificates themselves.

A TAX UPON THE SALE OF ARTICLES IS IN SUBSTANCE A TAX UPON THE ARTICLES THEMSELVES AND IS INVALID IF A TAX LAID IN THE SAME MANNER UPON THE ARTICLES THEMSELVES IS INVALID.

Brown *vs.* Maryland, 12 Wheaton, 419, 444.
Welton *vs.* Missouri, 91 U. S., 275, 279.
Cook *vs.* Pennsylvania, 97 U. S., 566, 578.
Almy *vs.* California, 24 How., 174.
Nicol *vs.* Ames, 173 U. S., 509, 521.
Fairbank *v.* United States, 181 U. S., 293.

TWO RULES OF CONSTRUCTION.

In determining the constitutionality of any tax law there are two rules or principles of interpretation which always control. They are these:

FIRST.—The substance and not the form of a tax must control.

Brown *vs.* Maryland, 12 Wheaton, 419, 444.

Postal Telegraph Cable Co. *vs.* Adams, 155 U. S., 688, 698.

Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S., 429, 581.

"The substance and not the shadow deter-
" mines the validity of the exercise of
" power."

Postal Telegraph Cable Co. *vs.* Adams, 155 U. S., 688, 698.

"It is the substance and not the form
" which controls, as has indeed been estab-
" lished by repeated decisions of this Court."

Pollock *vs.* Farmers' Loan and Trust Co , 157 U. S., 581.

Fairbank *vs.* The United States, 181 U. S., 283, 323.

SECOND. That which cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result.

Fairbank *vs.* United States, 181 U. S., 283,294.

These two principles of construction have been applied by this Court to many State statutes and to several acts of Congress. The leading if not the earlier case in point is that of Brown *vs.* Maryland, 12 Wheaton, 420. In 1827 a penal statute of the State of Maryland, which required all importers of foreign goods and merchandise to take out and pay for a license before they could sell any imported article was declared by this Court to be in conflict with that provision of the Federal Constitution which provides that "no state shall, without the consent of Congress, lay any impost or duty on im-

ports or exports, except what may be absolutely necessary for executing its inspection laws". Mr. Chief Justice Marshall delivered the opinion of the Court and the principles laid down by him apply with equal force to the subject now under consideration.

In answer to the argument that the tax laid by the Maryland statute was not a tax upon importations or the articles imported but was simply a tax upon the business of importation or of the importer as an importer, he said:

> "But if it should be proved that a duty on "the article itself would be repugnant to the "constitution, it is still argued that this is "not a tax upon the article, but on the per-"son. The State, it is said, may tax occupa-"tions, and this is nothing more."
>
> "It is impossible to conceal from ourselves "that this is varying the form, without vary-"ing the substance. It is treating a prohibi-"tion which is general, as if it were confined "to a particular mode of doing the forbid-"den thing. All must perceive that a tax on "the sale of an article, imported only for "sale, is a tax on the article itself. * * * "So, a tax on the occupation of an importer "is, in like manner, a tax on importation. "It must add to the price of the article, and "be paid by the consumer, or by the importer "himself, in like manner as a direct duty on "the article itself would be paid. This the "State has not a right to do because it is "prohibited by the Constitution." (12 Wheaton, 444)

The plaintiff in error submits that the portion of the War Revenue Law in question in the case at bar, while in form it purports to be a tax upon the transaction -the act of sale itself and not the property sold- is in effect a tax upon the shares or certificates of stock sold and transferred; for from the price or value of the shares or certificates of stock sold and transferred must be deducted the amount of the revenue stamps required by the act which

must be paid by the vendor in a like manner as a direct tax on the shares or certificates of stock would have to be paid by the owner. This, he contends, Congress has not the right to do because the tax being thus a direct tax *on property* and not laid in proportion to the population is repugnant to the Constitution.

The learned Judge in the trial court states the argument for the Government in the most plausible manner possible in the following language: (Record, p. 9)

> "A system of taxation upon the sale of "property is in essential elements different "from a system that lays the tax directly "upon property. The latter system is cer- "tain, because the tax is sure to arise and to "be paid in any event. There is but a single "condition requisite to the existence and pay- "ment of such a tax, and that is, the exist- "ence of the property. The statute is direct "in its application, and in theory payment is "inevitable, and to such payment principle "and income alike are pledged. But a tax "payable on the sale of property is con- "tingent upon, and is laid upon, an event "that may never arise, and the tax, in the "meantime, is non-existent. For example, a "statute providing for a direct tax on a parcel "of land is, save as delayed by the acts of "assessment and levy, instant in its opera- "tion, and the tax attaches as a lien upon the "land, from which it may be dissociated only "by payment. A statute directing a tax on "contracts of sale of land is entirely execu- "tory, and may never be executed, and the "estate continues in the hands of the owner, "without burden or incumbrance. In the "case at bar, the affixing of the stamp awaits "the sale, and even then the certificate passes "without disability to the transferee. Hence, "no burden is laid on the certificate, nor does "it ever become liable for the payment of the "tax. The law simply says to the vendor, "'When you do an act you shall pay a tax.'"
>
> Thomas, *J.*, United States *v.* Thomas.

This argument violates both of the rules above stated that "the substance and not the form of a tax must control", and that "that which cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result". Such a line of argument is refuted by this Court in the case of Brown *vs.* Maryland. Counsel for the State of Maryland attempted to draw a distinction between a license tax upon an importer, as an importer, and a tax or impost upon the article imported. In answer to this line of argument Mr. Chief Justice Marshall said:

> "Whether the prohibition to 'lay imposts, " ' or duties on imports or exports', proceeded " from an apprehension that the power might " be so exercised as to disturb that equality " among the States which was generally ad- " vantageous, or that harmony between them " which it was desirable to preserve, or to main- " tain unimpaired our commercial connections " with foreign nations, or to confer this source " of revenue on the government of the Union, " or whatever other motive might have in- " duced the prohibition, it is plain that the ob- " ject would be as completely defeated by a " power to tax the article in the hands of the " importer the instant it was landed, as by " a power to tax it while entering the port. " There is no difference, in effect, between a " power to prohibit the sale of an article and " a power to prohibit its introduction into the " country. The one would be a necessary " consequence of the other. No goods would " be imported if none could be sold."
>
> Brown *vs.* Maryland, 12 Wheaton, 420, 439.

Following the same line of argument, the contention of the plaintiff in error is that a tax levied upon the sale of shares or certificates of stock is as much a direct tax as a tax levied upon the article itself for in effect it says to every citizen "you need not pay any tax so long as you hold and keep these

shares and certificates of stock in your possession, but if for any reason you desire to sell or are compelled to sell or transfer them, in other words if you wish to exercise and enjoy one of the inherent attributes of property, then you must pay a tax".

So in Brown *vs.* Maryland the Maryland statute said to every citizen "you may import foreign goods and so long as you keep them you need not pay any duty or take out a license, but before you can sell them you must pay the State a license", and to this the Court said: "It is impossible to conceal from ourselves that this is varying the form without varying the substance". (Brown *vs.* Maryland, 12 Wheaton, 444)

OTHER ILLUSTRATIONS OF THE RULES OF CONSTRUCTION.

Other leading decisions of this Court illustrate the two propositions that "the substance and not the form of a tax must control", and that "that which cannot be done directly, because of constitutional restrictions, cannot be accomplished indirectly by legislation which accomplishes the same result".

I.—A statute of the State of Missouri required the payment of a license tax from travelling salesmen engaged in selling within the State goods, wares and merchandise which were not the growth, product or manufacture of the State and required no such license tax from persons selling in a similar way goods which were the growth, product or manufacture of the State. This statute was held to be in conflict with the power vested in Congress "to regulate commerce with foreign nations and among the several States". In delivering the opinion of the Court as to this statute Mr. Justice Field said:

> "Where the business or occupation con-
> "sists in the sale of goods, the license tax
> "required for its pursuit is in effect a tax

"upon the goods themselves. If such a tax
"be within the power of the State to levy, it
"matters not whether it be raised directly
"from the goods, or indirectly from them
"through the license to the dealer; but, if
"such a tax conflict with any power vested
"in Congress by the Constitution of the
"United States, it will not be any the less in-
"valid because enforced through the form of
"personal license."

Welton *vs.* Missouri, 91 U. S., 275.

So the appellant maintains that the tax complained of in the case at bar is not any less invalid because enforced through the form of a tax upon a sale or transfer.

II.—An act of the legislature of Pennsylvania required auctioneers to pay into the treasury of the State a graduated tax on all sales made by them of foreign or imported goods. This Court declared the act invalid upon the ground that the tax on sales of foreign goods was in effect a tax on the goods sold and necessarily void because contrary to the inhibition to the States to tax imports and in contravention of the exclusive power of Congress to regulate interstate commerce.

Cook *vs.* Pennsylvania, 97 U. S., 566.

III.—The State of California laid a stamp tax on certain instruments of writing including bills of lading for the transportation of gold and silver coin or bars from points within the State to points without the State. This law was held to be in effect a tax upon gold or silver exported and contrary to the provision of the Constitution which declares that "no State shall, without the consent of the Congress, lay any imposts, or duties on any imports or exports". Mr. Chief Justice Taney said:

"But a tax or duty on a bill of lading,
"although differing in form from a duty on

"the article shipped, is in substance the same "thing."

Almy *vs.* State of California, 24 How., 174.

This case was modified in a subsequent decision in the case of Woodruff *vs.* Parham (8 Wall., 123). The modification related to the definition of "imports" and "exports" as used in the Constitution but did not change or affect the rule above stated which has been recently affirmed by this Court in the following language:

"It is true that thereafter, in Woodruff "*vs* Parham, 8 Wall., 123, it was held that "the words 'imports' and 'exports' "as used in the Constitution were "used to define the shipment of articles "between this and a foreign country, and "not that between the States, and while "therefore that case (Almy *vs.* California) is "no longer an authority as to what is or "what is not an export, the proposition that "a stamp duty on a bill of lading is in effect "a duty on the article transported remains "unaffected. In other words, that decision "affirms the great principle that what can- "not be done directly because of constitu- "tional restrictions cannot be accomplished "indirectly by legislation which accomplishes "the same result."

Fairbank *vs.* United States, 181 U. S. 283, 294.

IV.—A State tax upon the bonds or stock of the United States is in substance a tax on the power of the Federal Government to borrow money on the credit of the United States and is therefore unconstitutional.

Weston *vs.* Charleston, 2 Peters, 449, 468.

V.—A Federal tax upon the income derived from municipal securities is in effect a tax on the power

of the States and their instrumentalities to borrow money and is therefore unconstitutional.

Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S., 429, 586.

VI.—A State tax upon the income of a resident of the State derived from a Federal office is unconstitutional because it is in effect a tax upon the office, one of the instrumentalities of the Federal government in the execution of its powers.

Dobbins *vs.* Commissioners, 16 Peters, 435.

VII.—A State tax upon the gross receipts of a steamship company derived from interstate and foreign commerce is in effect a regulation of interstate and foreign commerce and therefore unconstitutional.

P. & S. Steamship Co. *vs.* Pennsylvania, 122 U. S., 326.

VIII.—A State tax on interstate commerce in any form whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation or on the occupation or business of carrying it on amounts to a regulation of interstate commerce and is therefore unconstitutional.

Leloup *vs* Port of Mobile, 127 U. S., 640, 648.

IX.—A tax deducted from the interest payable on bonds is in substance a tax upon the bonds themselves.

Railroad Co. *vs.* Jackson, 7 Wall., 262.

CONCLUSION OF ARGUMENT.

We are not left in this argument to analogies and decisions upon more or less remote State and Federal statutes. We have two decisions of this Court upon two paragraphs of "Schedule A" of this same War Revenue Law both of which affirm and sustain our position. These decisions were in the case of Nicol *vs.* Ames (173 U. S., 509) upholding the second paragraph and the case of Fairbank *vs.* United States (181 U. S., 283) annulling and holding void the fifth paragraph of "Schedule A".

Nicol *vs.* Ames was the earlier case. The decision involved the validity of that portion of "Schedule A" which provided that "upon each sale, agreement of sale, or agreement to sell any produce or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery" there should be levied a tax of one cent for each one hundred dollars in value or fractional part thereof and that the seller should deliver to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which a stamp should be affixed. This Court held that portion of the War Revenue Law to be valid because "the tax is in effect a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act".

Mr. Justice Peckham in announcing the decision of the Court said:

> "We think the tax is in effect a duty or
> "excise laid upon the privilege, opportunity,
> "or facility offered at boards of trade or ex-
> "changes for the transaction of the business
> "mentioned in the act. It is not a tax upon
> "the business itself which is so transacted,
> "but it is a duty upon the facilities made use

" of and actually employed in the transaction
" of the business, and separate and apart from
" the business itself. It is not a tax upon the
" members of the exchange nor upon mem-
" bership therein, nor is it a tax upon sales
" generally. The act limits the tax to sales at
" any exchange, or board of trade, or other
" similar place, and its fair meaning is to im-
" pose a duty upon those privileges or facili-
" ties which are there found and made use
" of in the sale at such place of any product
" or merchandise. * * *

" *A tax upon the privilege of selling prop-*
" *erty at the exchange and of thus using the*
" *facilities there offered in accomplishing the*
" *sale differs radically from a tax upon every*
" *sale made in any place. The latter tax is*
" *really and practically upon property.*"

Nicol *vs.* Ames, 173 U. S., 509, 519, 521.

The paragraph last quoted shows that the Court recognized the fact that if the paragraph of "Schedule A" in question in Nicol *vs.* Ames had levied the tax upon all sales made in any place it would have been a direct tax and would not have withstood the test of the Constitution under the rule of apportionment.

This is exactly the case which the plaintiff in error now presents for the consideration of this Court. He complains of a tax which is levied upon all sales or agreements to sell or transfers of shares or certificates of stock made in any place and which is not apportioned according to numbers.

Any doubt as to what Mr. Justice Peckham meant when he said that a tax upon every sale made in every place is really and practically upon property has been set at rest by the opinion of this Court delivered by Mr. Justice Brewer two years later in the case of Fairbank *vs.* United States. The Court said:

" In Nicol *vs.* Ames, 173 U. S., 509, we
" had occasion to consider this very act in

"reference to another stamp duty required "by the same schedule 'A', to wit, the "clause:

"'Upon each sale, agreement of sale, or "'agreement to sell, any products or mer-"'chandise at any exchange, or board of "'trade, or other similar place, either for "'present or future delivery, for each one "'hundred dollars in value of said sale or "'agreement to sell, one cent, and for each "'additional one hundred dollars, or frac-"'tional part thereof in excess of one hun-"'dred dollars, one cent.'

"We sustained that tax as a tax upon the "privilege or facilities obtained by dealings "on exchange, saying (p. 521):

"'A tax upon the privilege of selling prop-"'erty at the exchange and of thus using "'the facilities there offered in accomplishing "'the sale differs radically from a tax upon "'every sale made in any place. The latter "'tax is really and practically upon prop-"'erty.'

"If it be true that a stamp tax required "upon every instrument evidencing a sale is "really and practically a tax upon the prop-"erty sold, it is equally clear that a stamp "duty upon foreign bills of lading is a tax "upon the articles exported.

"These considerations find ample support "in prior adjudications of this Court."

Fairbank *vs.* United States, 181 U. S., 283, 293.

A TAX UPON THE SALES OF SHARES OR CERTIFICATES OF STOCK IS IN SUBSTANCE A TAX UPON THE SHARES OR CERTIFICATES THEMSELVES AND IS THEREFORE A DIRECT TAX UPON PROPERTY WITHIN THE MEANING OF THE CONSTITUTION. THE ACT IN QUESTION LAYING A TAX UPON THE SALES OF SHARES OR CERTIFICATES OF STOCK NOT IN PROPORTION TO THE CENSUS OR ENUMERATION AND

NOT APPORTIONED AMONG THE STATES ACCORDING TO THEIR NUMBERS IS UNCONSTITUTIONAL AND VOID.

THE JUDGMENT OF THE CIRCUIT COURT SHOULD BE REVERSED.

Respectfully submitted,

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